

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JAN 12 2011

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

In re the Marriage of:	)	2 CA-CV 2010-0130
	)	DEPARTMENT B
JOSEPH D. BASHAM,	)	
	)	<u>MEMORANDUM DECISION</u>
Petitioner/Appellee,	)	Not for Publication
	)	Rule 28, Rules of Civil
and	)	Appellate Procedure
	)	
ROBIN L. BASHAM,	)	
	)	
Respondent/Appellant.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D20065444

Honorable Deborah Ward, Judge Pro Tempore

AFFIRMED

\_\_\_\_\_  
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Tucson  
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\_\_\_\_\_  
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\_\_\_\_\_  
K E L L Y, Judge.

¶1 Appellant Robin Basham appeals from the trial court’s order awarding her former spouse, Joseph Basham, sole legal and primary physical custody of their minor children. Finding no abuse of discretion, we affirm.

### **Background**

¶2 “We view the record in the light most favorable to upholding the trial court’s decision.” *Duwyenie v. Moran*, 220 Ariz. 501, ¶ 2, 207 P.3d 754, 755 (App. 2009). Joseph and Robin were married in 1993. In 2006, Joseph filed a petition for dissolution of the marriage. At the time, the couple had four minor children, a fifteen-year-old son and ten-year-old triplets.<sup>1</sup> In July 2007, the trial court issued a temporary order transferring primary physical custody of the children from Robin to Joseph, because of “concerns regarding the mother’s condition . . . [and] the welfare of the minor children.” After a two-day trial in December 2008, the court entered a decree of dissolution in 2009. Among other things, the decree provided that Joseph would have sole legal custody of the four minor children.

¶3 Robin appealed the 2009 decree, challenging the provisions on child custody, parenting time, child support, and spousal support. In *Basham v. Basham*, No. 2 CA-CV 2009-0107, ¶ 5 (memorandum decision filed Feb. 12, 2010), we vacated and remanded the decree with regard to child custody, because the trial court had failed to make specific findings as required by A.R.S. § 25-403, but affirmed the court in all other respects. Following our decision, the trial court issued an under-advisement ruling in

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<sup>1</sup>Custody of the oldest child is no longer at issue because he has reached the age of majority.

which it made specific factual findings and analyzed the § 25-403 factors. In this ruling, the court again awarded sole legal custody of the minor children to Joseph. This appeal followed.

## **Discussion**

### **I. Child Custody**

¶4 Preliminarily, transcripts of the proceedings have not been made part of the record on appeal. As the appellant, Robin was obligated to “mak[e] certain the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised . . . .” *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995); *see also* Ariz. R. Civ. App. P. 11(b). In the absence of transcripts, we presume they support the trial court’s order, and address Robin’s claims accordingly. *See Baker*, 183 Ariz. at 73, 900 P.2d at 767.

¶5 In deciding child custody issues, “[t]he trial court is given broad discretion in determining what will be the most beneficial for the children, and it is in the best position to determine what is in the children’s interest.” *Porter v. Porter*, 21 Ariz. App. 300, 302, 518 P.2d 1017, 1019 (1974) (citation omitted). We therefore review the court’s judgment for an abuse of discretion. *See Owen v. Blackhawk*, 206 Ariz. 418, ¶ 7, 79 P.3d 667, 669 (App. 2003). We can say the trial court has abused its discretion when “the record [is] devoid of competent evidence to support” the court’s decision. *Borg v. Borg*, 3 Ariz. App. 274, 277, 413 P.2d 784, 787 (1966), *quoting Fought v. Fought*, 94 Ariz. 187, 188, 382 P.2d 667, 668 (1963).

¶6 Robin argues “[t]he [c]ourt did not have sufficient evidence to change legal and physical custody of the children from [Robin] to [Joseph].” She contests both the trial court’s final order, issued on April 28, 2010, and the temporary change of custody, issued on July 17, 2007. Temporary orders are not appealable and the 2007 order was rendered moot by the court’s final judgment modifying custody. *Villares v. Pineda*, 217 Ariz. 623, ¶ 10, 177 P.3d 1195, 1196-97 (App. 2008) (“[a]n order that is merely “preparatory” to a later proceeding that might affect the judgment or its enforcement is not appealable”), *quoting Arvizu v. Fernandez*, 183 Ariz. 224, 227, 902 P.2d 830, 833 (App. 1995); Ariz. R. Fam. Law P. 47(M) (temporary order becomes ineffective and unenforceable following entry of a final judgment or order). Therefore, we consider Robin’s claims only as they pertain to the 2010 order.

¶7 “Arizona’s public policy makes the best interests of the child the primary consideration in awarding child custody.” *Downs v. Scheffler*, 206 Ariz. 496, ¶ 7, 80 P.3d 775, 778 (App. 2003). Section 25-403(B), A.R.S., provides that, “[i]n a contested custody case, the court shall make specific findings on the record about all relevant factors and the reasons for which the decision is in the best interests of the child[ren].” Robin argues that the trial court failed to make specific findings, and that its decision “was not supported by any factual findings.” But the court’s ruling belies this contention. The court stated it had “review[ed] the requirements of [§] 25-403,” and expressly addressed the statutory factors.

¶8 Robin also asserts, however, that the “testimony presented at trial did not support a finding that [Joseph] should have full legal and physical custody of the children[,]” and that the court denied her “the right to introduce additional rebuttal testimony at the close of trial.” Without a transcript of the hearing, however, we must assume that the evidence presented to the court was sufficient to support its findings. *See Kohler v. Kohler*, 211 Ariz. 106, n.1, 118 P.3d 621, 623 n.1 (2005). Furthermore, Robin provides no authority for her contention that the court erred, nor does she describe the testimony that was allegedly precluded. These arguments are therefore abandoned. *See* Ariz. R. Civ. App. P. 13(a)(6) (appellant’s argument “shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on”); *FIA Card Servs., N.A. v. Levy*, 219 Ariz. 523, n.1, 200 P.3d 1020, 1021 n.1 (App. 2008) (failure to develop an argument on appeal constitutes abandonment).

¶9 Robin also argues that the trial court erred by failing to personally interview the couple’s minor children. Section 25-405(A), A.R.S., provides that “[t]he court may interview the child[ren] . . . to ascertain the child[ren]’s wishes . . . .” The use of the word “may” in the statute clearly gives the trial court discretion to interview the children. *See Simpson v. Simpson*, 224 Ariz. 224, ¶ 8, 229 P.3d 236, 238 (App. 2010) (use of “the discretionary word ‘may’ give[s] court discretion”). And, other than citing to that statute, Robin provides no authority supporting the contention that the court is required to conduct such an interview or that its decision not to do so was reversible error.

Therefore, we cannot say the court abused its discretion in awarding Joseph sole legal custody of the minor children. *See Owen*, 206 Ariz. 418, ¶ 7, 79 P.3d at 669.

## **II. Attorney Fees and Costs**

¶10 Pursuant to Rule 25, Ariz. R. Civ. App. P., Joseph has requested attorney fees and costs on appeal, contending this appeal was frivolous. Under the rule, an appeal may be considered frivolous when a party takes a position that is not supported by any reasonable legal theory and presents no colorable legal argument. *See In re Levine*, 174 Ariz. 146, 153, 847 P.2d 1093, 1100 (1993). Although we impose Rule 25 sanctions only with “great reservation[,]” *Ariz. Tax Research Ass’n v. Dep’t of Revenue*, 163 Ariz. 255, 258, 787 P.2d 1051, 1054 (1989), we agree that this appeal was frivolous.

¶11 This is Robin’s second appeal in this matter. As in her first appeal, she has failed to provide citations to the record or to any substantial authority supporting her arguments as required by Rule 13(a)(6), Ariz. R. Civ. App. P., and to provide the transcripts necessary for our review, *see* Rule 11(b), Ariz. R. Civ. App. P. (appellant’s duty to order transcripts). Although in her first appeal we granted relief on the child custody issue, we rejected all of Robin’s other arguments, either as abandoned under Rule 13(a)(6), or impossible to review because she “ha[d] not provided this court with the trial transcripts.” *Basham*, No. 2 CA-CV 2009-0107, at 2-6. In addition to the Rules of Civil Appellate Procedure, our previous decision informed Robin of the requirement to provide transcripts. Therefore, contingent on his compliance with Rule 21, Ariz. R. Civ.

App. P., we award Joseph his reasonable attorney fees as a sanction under Rule 25, and his court costs as the prevailing party on appeal.

**Disposition**

¶12           The judgment of the trial court is affirmed.

/s/ Virginia C. Kelly  
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom  
PETER J. ECKERSTROM, Judge